

STRAFFORD, SS.

SUPERIOR COURT

The State of New Hampshire

v.

James Hermonat

Docket Nos. 97-S-524, 98-S-120-122, 98-S-169-180

ORDER

The defendant is charged with one count of Attempted Aggravated Felonious Sexual Assault, one count of Possession of an Infernal Machine, two counts of Reckless Conduct and twelve counts of Accomplice to Criminal Mischief. The defendant currently resides at the New Hampshire State Hospital where he receives treatment for certain mental conditions he suffers as a result of a brain injury.

The court held a hearing on May 20, 1998, and May 26, 1998, to determine whether the defendant is competent to stand trial. The defendant presented the testimony of Dr. Higgins who offered an opinion that the defendant is not competent to stand trial, largely as a result of a brain injury he received in 1994. The State's expert, Dr. Adams, testified that the defendant is competent to stand trial and based his opinion on the defendant's prior criminal history and on the observations of other care providers. Dr. Adams was unable to rely on his interview with the defendant, since the defendant answered falsely to many questions and attempted to manipulate certain test results.

Dr. Higgins' expertise specifically involves the treatment and evaluation of individuals suffering from brain injuries. Though he has not testified in any criminal proceedings in which a defendant's competency is at issue, he has performed many competency evaluations on brain injured patients in his care. The defendant in this case suffered a moderate to severe brain injury in 1994 as a result of a motorcycle accident. Dr. Higgins testified that because of the location of the injury, the defendant is cognitively impaired and is unable to strategize or draw conclusions in hypothetical situations. He has limited insight into his own behavior and is quite impulsive. As a result, the defendant cannot manage the complexities of court proceedings. In addition, the defendant's verbal comprehension is low and he has no understanding of abstract information. In Dr. Higgins' opinion, these deficiencies prevent the defendant from evaluating witness testimony and generally assisting in trial strategy. For example, Dr. Higgins stated that the defendant does not possess the ability to determine whether he should testify if he went to trial.

Dr. Adams testified on behalf of the State. Though he ultimately found the defendant competent to stand trial, he reached this conclusion not based on his personal evaluation of the defendant, but rather on consideration of outside information such as police reports from 1997, the defendant's criminal record, a report from the defendant's legal guardian, Sandra Scott, and

records from the defendant's previous hospitalizations. Since Dr. Adams concluded the defendant had malingered throughout the evaluation, he did not rely on the defendant's input in reaching his opinion. Dr. Adams explained that while malingering is not affirmative evidence of competence, the defendant's untruthful responses impaired Dr. Adam's ability to conduct an adequate interview. Though some of Dr. Adams testing revealed that the defendant did not suffer striking abnormalities in his ability to plan and exercise other executive functions, the Dr. nonetheless testified that his interview with the defendant alone produced insufficient evidence upon which to base a finding of competence.

To support his ultimate finding of competence, Dr. Adams relied partially on a report Ms. Scott had prepared in connection with the Probate Court proceeding appointing her as the defendant's legal guardian. In that report, Ms. Scott, who has no psychological training or background, complained that the defendant consistently manipulated the system and was not incapable of, but rather unwilling to assist in the management of his financial affairs.

At the hearing, however, Ms. Scott testified that she knew little about the behavioral patterns of brain injured individuals and since the writing of her report has attended several seminars on the topic. She now believes her original opinions did not adequately account for the defendant's condition and that his behavior could be a result of his brain injury.

Ms. Scott also testified that most of the defendant's decisions were based on his immediate needs without regard for any other consequences. She recalled a two hour conversation she had with him about one year ago in which she tried to discuss his future. She urged him to consider the effect his life style was having on his child. Though he participated somewhat and appeared to be listening, at the end of the conversation he asked Ms. Scott if his mother had remembered to bring his sweater.

Dr. Adams' finding of competence also depended on the fact that the defendant had been convicted of several misdemeanors in the past. In those cases, however, the defendant did not go to trial, but rather, pled guilty. In addition, his legal counsel did not raise the issue of competence in any of the cases. The fact that a court accepted the defendant's guilty pleas without having considered the issue of the defendant's competence is not persuasive evidence that the defendant is now competent.

The court listened to a tape-recorded interview of the defendant during which he discussed his participation in several of the crimes for which he is now charged. The defendant's manner appeared flat and he spoke in a monotone voice. He did, however, appear to be able to discuss the facts in a logical and coherent fashion. The court was unable to learn much about the defendant's competence from the content of the interview, given its short length and the straight forward nature of the topic.

"A criminal defendant has a constitutional right not to be

tried, if he is legally incompetent." State v. Champagne, 127 N.H. 266, 270 (1985) (citing Pate v. Robinson, 383 U.S. 375, 378 (1966); State v. Bertrand, 123 N.H. 719, 724-25 (1983)). The New Hampshire Supreme Court has adopted the two-pronged test for competency as formulated by the United States Supreme Court in Dusky v. United States, 362 U.S. 402 (1960). See State v. Champagne, 127 N.H. 266 (1985). That test asks "'whether [a criminal defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as [a] factual understanding of the proceedings against him.'" State v. Champagne, 127 N.H. at 270 (quoting Dusky v. United States, 362 U.S. at 402). The State has the burden of proving by a preponderance of the evidence that both prongs of the Dusky test are met. See State v. Champagne, 127 N.H. 266, 270 (1985).

To be competent to stand trial, a defendant need not have a highly developed understanding of legal strategy. She only needs to have a "rational ... [and] factual understanding of the proceedings against him" and the "ability to consult with his lawyer with a reasonable degree of rational understanding." State v. Champagne, 127 N.H. at 270.

Though both experts presented credible testimony, the court has insufficient information upon which to reach a decision about the defendant's competence. The State's presentation establishes more probable than not that the defendant has a rational and

factual understanding of the proceedings against him, but the State has not satisfied its burden to prove the defendant has the present ability to consult with his lawyer with a reasonable degree of rational understanding. Not only was Dr. Adams testimony weak on this point, but when the prosecutor specifically asked the Dr. whether the defendant had the present ability to consult with his lawyer, he paused for a significant period of time until the State prompted a yes answer by referring to State v. Champagne.

In light of the above-described circumstances, the court shall appoint a neutral examiner to conduct a psychological evaluation of the defendant and to render an opinion to the court regarding the defendant's competence. The examiner shall forward a copy of his final report to the State and defense counsel. Once the court reviews the report, it will issue a final opinion regarding the defendant's competence.

SO ORDERED.

Date: June 10, 1998 _____
Tina L. Nadeau
Presiding Justice